No. 75-1844

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F.2d 59.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 23, 1976. On April 21, 1976, the court of appeals denied a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. C). On May 11, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 20, 1976 (a Sunday). The petition was filed on June 21, 1976, and was granted on

October 12, 1976 (A. 27). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who seeks the dismissal of an indictment because of pre-accusation delay must show that the government intentionally sought the delay in order to secure an improper tactical advantage as well as that the delay impaired his ability to defend against the charges.

2. Whether a district court should reserve ruling on a due process claim based upon pre-accusation delay, and alleging both governmental misconduct and consequent prejudice, until after trial, at which time such allegations can be assessed in light of the evidence introduced at trial.

STATEMENT

1. Respondent was indicted on March 6, 1975, in the United States District Court for the Eastern District of Missouri on three counts of unlawful possession of materials stolen from the mails, in violation of 18 U.S.C. 1708, and on one count of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a). The indictment referred specifically to eight handguns that respondent allegedly had possessed and sold between July 25 and August 31, 1973 (A. 3–5).[1]

[1] Count One charged respondent with unlawfully possessing a semi-automatic pistol on or about July 25, 1973; Count Two charged that he unlawfully possessed another such pistol on or about July 27, 1973; Count Three charged that he unlawfully possessed six additional semi-automatic pistols on or about August 31, 1973; and Count Four charged respondent with having sold firearms without the necessary license (A. 3–5).

On March 18, 1975, respondent, invoking Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment, moved to dismiss the indictment (A. 6–7). He alleged in his motion (1) that the government had not obtained any information relating to the offenses charged in the indictment after September 26, 1973; (2) that the government thereafter had delayed presenting the evidence against him to the grand jury for a period of approximately 18 months; (3) that the delay in presenting such evidence was unreasonable; and (4) that the delay had caused him to experience "anxiety and concern" (A. 6). Respondent did not allege that the government had delayed seeking an indictment to secure an improper tactical advantage over him, and he made no effort to particularize the respects in which the delay had impaired his ability to defend against the charges.[2]

On April 25, 1975, the district court held a hearing on respondent's motion to dismiss (A. 8–20). The government stipulated at the outset of the hearing that a postal inspector had interviewed respondent in September 1973 concerning a series of thefts from a mail facility operated by the Terminal Railroad Association in St. Louis, Missouri, and that, although investigation of the thefts had continued thereafter,

[2] In fact, respondent did not assert explicitly that the delay had impaired his ability to defend himself at trial. In addition to claiming that he had experienced "anxiety and concern," he alleged only that he had "been prejudiced by the delay in the presentment to the Grand Jury" (A. 6).

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only one witness had been discovered after September 1973 who might have bolstered the government's case against respondent (A. 9–10).

In support of his allegation that the government had sufficient evidence as of September 1973 to warrant presenting the case against him to the grand jury, respondent introduced at the hearing a report that had been prepared by Postal Inspector G. P. Wellner (A. 8–9, 21–26). The report was dated October 2, 1973, and had been forwarded to the United States Attorney at that time (A. 18–19). The report indicated that between August 20 and September 5, 1973, government agents had purchased three semi-automatic handguns from Martin Koehnken and a fourth handgun from David Northdurft. These handguns had been sold by the Browning Arms Company to various retailers but had been stolen, prior to their receipt by the retailers, after mailing from a Terminal Railroad Association facility in St. Louis. Government agents arrested Koehnken on September 11, at which time they seized four additional stolen handguns.[3] Subsequent investigation revealed that Koehnken had purchased the eight guns—including the gun that Northdurft had sold to the agents—from Joe Boaz. Boaz was interviewed on September 24, 1973, and admitted that he had known that the guns were "hot" when he sold them to Koehnken. Boaz also stated during the interview that he had ob-

[3] Koehnken subsequently pleaded guilty to a single count charging him with having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) (see A. 23).

tained all eight guns from respondent between July 26 and September 11, 1973 (A. 22–24).

Respondent, a switchman for the Terminal Railroad Association, was interviewed in the presence of his attorney on September 26, 1973. He claimed that after having visited his son, a mail handler for the Railroad Association, he had found "four or five" handguns in a sack in the back seat of his automobile.[4] He admitted selling the guns he had found to Boaz, but he specifically denied having sold Boaz all eight of the guns that had been purchased or seized from Koehnken. The report also indicated that respondent would not have had access to insured mail parcels in the normal course of his duties as a switchman and that, although his son would have had access to insured parcels and had endorsed and cashed three of the four checks that Boaz had given respondent as payment for the guns, the postal inspectors had no direct evidence at that time that respondent's son was responsible for the thefts (A. 24).

Respondent testified at the hearing that two "possible" witnesses on his behalf had died during the eighteen-month delay referred to in his motion to dismiss—his brother and Tom Stewart.[5] He testified that his brother, who had worked prior to his death

[4] Respondent claimed that he had visited his son while his son was at work and that he had left his automobile unlocked during the visit (A. 24).

[5] Respondent testified that Stewart had died approximately six months before the date of the hearing and that his brother had died in April 1974, approximately one year before the hearing (A. 11–12).

at the same place of business as Boaz, had introduced him to Boaz and had been present when he made arrangements by telephone to obtain guns to sell to Boaz (A. 11–12). Respondent also testified that he had obtained "some of the guns" identified in the indictment from Stewart and that he had arranged to obtain those guns by telephoning Stewart from Boaz's office (A. 12).[6] On cross-examination, however, respondent stated that he had obtained only "two or three" guns from Stewart in that manner (A. 13). He conceded further that he had told the postal inspector who had questioned him that he had found some of the guns he had sold in a sack in the back seat of his automobile and that he had not mentioned Stewart's name at that time. He explained that he had not disclosed Stewart's involvement earlier because Stewart "was a bad tomato" and "was liable to take a shot" at him (*ibid.*). Respondent did not specify at the hearing what exculpatory evidence his brother or Stewart might have provided.[7]

2. On October 8, 1975—following an aborted attempt by respondent to plead guilty to a misde-

[6] Like respondent, Stewart worked as a switchman at the Railroad Terminal Association (A. 11) and, as a consequence, presumably would not have had access to insured mail parcels in the normal course of his duties.

[7] Postal Inspector Wellner was also a witness at the hearing and testified that evidence had been presented to the grand jury tending to show that persons in addition to respondent had been involved in the matters charged in the indictment (A. 20). The government earlier had informed the court that its theory of the case was that respondent had received the handguns referred to in the indictment from his son (A. 13–14).

meanor[8]—the district court entered an order dismissing all counts of the indictment. The court based its dismissal on Rule 48(b) of the Federal Rules of Criminal Procedure, stating in relevant part (Pet. App. 14a):

> [A]s of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to [respondent's] alleged commission of the offenses charged against him, but did not charge [respondent] or present the matter to a grand jury until more than 17 months thereafter. * * *
>
> As a result of the delay [respondent] has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.

On February 23, 1976, a divided panel of the court of appeals affirmed the dismissal of the three possession counts of the indictment and ordered reinstatement of the court charging respondent with dealing in firearms without a license. The majority (comprised of Justice Clark and Judge Bright) rested its

[8] On August 8, 1975, respondent attempted to plead guilty to a superseding information charging him with having knowingly and willfully obstructed and retarded the passage of mail matter, in violation of 18 U.S.C. 1701. But during the hearing on the plea, respondent repeated his earlier statement about having found the handgun referred to in the information in an unmarked package in the back seat of his automobile. The government informed the court that "it's our position that if [respondent] didn't know it was mail matter then he cannot enter a plea of guilty to the offense" (Plea Tr. 32), and the court thereafter declined to accept the plea.

affirmance upon its finding that respondent had established "the two basic elements essential to a claim of preindictment delay—unreasonable delay and prejudice to [his] ability to defend against the charges" (Pet. App. 5a). Although the majority acknowledged that the delay had been occasioned by the government's desire to identify additional persons who may have participated in the thefts, it nevertheless concluded that the district court's finding that the delay was "unjustified, unnecessary, and unreasonable" was supported by the evidence (*ibid.*). With respect to the district court's finding of prejudice, the majority relied upon the assertion of respondent's counsel in brief and argument—but not made at or supported by the testimony at the hearing on the motion to dismiss—"that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails" (*ibid.*).[9]

Judge Henley dissented from the decision insofar as it upheld the district court's dismissal of the three possession counts, in part for the reasons stated in his dissenting opinion in *United States* v. *Barket,* 530 F. 2d 189, 197–199 (C.A. 8). Judge Henley stressed that "the fifth amendment protection against pre-indictment or preprosecution delays is not coextensive

[9] The court reversed the district court's dismissal of the count of the indictment charging respondent with dealing in firearms without a license, after having concluded that that count related solely to a transaction between respondent and Boaz and that Stewart's death could not have impaired respondent's ability to defend against that charge (Pet. App. 6a–7a).

with the 'speedy trial' protection accorded by the sixth amendment" and that "the subject of a criminal investigation has no constitutional right to immediate prosecution or arrest" (Pet. App. 8a). Judge Henley also pointed out that respondent had not offered any evidence tending to show that the delay in obtaining the indictment "was motivated by any sinister desire on the part of the investigating officers or the United States Attorney to gain a tactical advantage * * *" (*id.* at 8a–9a).[10]

Judge Henley noted additionally that respondent's belated assertion of prejudice as a result of Stewart's death made that assertion highly suspect (*id.* at 9a–10a), and he concluded that, in any event, "the district court's finding that [respondent] sustained substantial prejudice as a result of the death of Tom Stewart was purely speculative and for that reason was clearly erroneous" (*id.* at 9a). According to Judge Henley (*id.* at 11a):

> When a district judge sustains in advance of trial a motion to dismiss an indictment because of prejudicial pre-indictment delay, he takes a stringent measure. And if such a motion is improvidently granted, it adversely affects the public interest in the enforcement of the criminal law, and it also encourages the filing

[10] In *Barket, supra,* Judge Henley had stated (530 F. 2d at 198):

> [P]rejudice conceded, my position in a case of this kind is that pre-prosecution delay does not amount to a denial of due process absent a showing of bad faith or improper motive on the part of the government in delaying the prosecution, or a showing of detrimental reliance by a putative defendant on the initial decision of the government not to prosecute.

> of meritless motions, similarly based, by other defendants. The dismissing of indictments on account of the government's delay in obtaining them is not an acceptable solution to the problem of crowded criminal calendars, and in my opinion motions such as * * * [respondent's] should not be granted in advance of trial except in clear cases.

SUMMARY OF ARGUMENT

I.

The standard employed by the Eighth Circuit in this and other recent cases for assessing the permissibility of pre-accusation delay renders this Court's decision in *United States* v. *Marion,* 404 U.S. 307, largely meaningless. In effect, the Eighth Circuit has imported into the pre-accusation phase of criminal proceedings obligations of efficient investigation and prompt indictment measured by standards comparably stringent to those adopted by this Court to govern application of the Sixth Amendment's explicit speedy trial requirement. In the process, the court has obliterated most if not all of the distinction between pre-accusation and post-accusation prosecutorial obligations, ignored substantial public policies that strongly counsel against rules that encourage premature public accusation, and created a host of practical difficulties having serious import for the administration of criminal justice. There was good reason for this Court's view in *Marion* that pre-accusation delay is materially different in nature and impact and should accordingly be assessed under less exacting criteria. We suggest again, as we did in *Marion,*

that the severe sanction of dismissal of charges is appropriate only in the rare case in which the defendant can demonstrate both that the delay stemmed from invidious motivations and that it caused substantial prejudice to his defense.

1. The decision in this case ignores significant differences in the status of persons before and after formal accusation—differences at the heart of this Court's determination in *Marion* that the obligations imposed by the Sixth Amendment's speedy trial provision are triggered by formal accusation, rather than by some prior act or omission attributable to the government. The personal disabilities that generally attend formal accusation either do not exist or are much less severe prior to arrest and holding to answer or the bringing of criminal charges. At the same time, delaying arrest or charge pending further investigation often benefits both the person suspected of criminal conduct and society generally by avoiding unwarranted or ill-considered accusations and by shortening the time between the bringing of charges and the defendant's opportunity to secure a determination of the charges at trial.

2. These considerations strongly counsel against a construction of the Due Process Clause obligating the government to institute formal criminal proceedings as soon as it might be thought to have probable cause to do so. There is, in fact, little justification for permitting courts to attempt to balance the various interests implicated during the pre-accusatory phase of criminal proceedings, since statutes of limitation already perform that function. Absent extraordinary

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circumstances, not present in this case, "[s]uch legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay." *Dickey* v. *Florida*, 398 U.S. 30, 47 (Brennan, J., concurring).

3. Assessing the permissibility of pre-accusation delay on a basically ad hoc basis would also entail unacceptable costs to the criminal justice system, without providing assurance of fairer results than those produced by application of the relevant statute of limitations. Perhaps most importantly, an ad hoc approach would require courts to engage in lengthy hearings and to resolve a variety of essentially policy disputes that transcend the individual case.

II.

The decision in this case also departs from previously accepted standards by endorsing a procedure for resolving due process claims based upon pre-accusation delay that, in practical effect, significantly dilutes the requirement that the defendant demonstrate that the delay caused actual and substantial prejudice to his ability to defend against the charges. While it may sometimes be possible, and not unduly burdensome, for a court to determine with some assurance prior to trial whether the government sought to delay formal accusation to secure an improper tactical advantage, the same will seldom be true of allegations of defense prejudice. The enhanced ability to make a sound assessment of claims of prejudice after trial, combined with the substantial economy of judicial and prosecutorial resources that will be accomplished by avoiding a lengthy pretrial hearing that will be largely duplicative of the trial itself, prove the soundness of the rule, which we urge this Court to adopt, requiring that due process claims such as respondent's normally be resolved after trial.

ARGUMENT

I.

A DEFENDANT SEEKING THE DISMISSAL OF CRIMINAL CHARGES UNDER THE DUE PROCESS CLAUSE BECAUSE OF PRE-ACCUSATION DELAY MUST SHOW BOTH THAT THE DELAY IMPAIRED HIS ABILITY TO DEFEND AGAINST THE CHARGES AND THAT THE GOVERNMENT SOUGHT THE DELAY TO SECURE AN IMPROPER TACTICAL ADVANTAGE

A. IN THE ABSENCE OF PROSECUTORIAL CONDUCT DESIGNED TO OBTAIN AN IMPROPER TACTICAL ADVANTAGE, THE PERMISSIBILITY OF PRE-ACCUSATION DELAY IS GOVERNED SOLELY BY THE APPLICABLE STATUTE OF LIMITATIONS

In *United States* v. *Marion*, 404 U.S. 307, this Court held that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections of the speedy trial provisions of the Sixth Amendment" (404 U.S. at 320). At the same time, *Marion* acknowledged that pre-accusation delay might in some instances violate the Due Process Clause of the Fifth Amendment and require the dismissal of criminal charges. Specifically, this Court referred approvingly to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's] right[ ]

to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted).

Several courts of appeals have had occasion in the wake of *Marion* to consider the application of the Due Process Clause to particular instances of pre-accusation delay. The position of the Eighth Circuit is exemplified by the decision in this case. The panel majority held here that the showing required of a defendant claiming a violation of due process because of pre-accusation delay is limited to "two basic elements"—a demonstration that the delay was "unreasonable" and a showing that it prejudiced the defendant's ability to defend against the charges (Pet. App. 5a). The majority then went on to hold that the delay that occurred here was unreasonable because the "essential" facts underlying the indictment were known to the prosecutor approximately 17 months prior to respondent's indictment, and "[n]o reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails" (*ibid.*). In an earlier case, *United States* v. *Barket,* 530 F.2d 181, a divided panel of the Eighth Circuit had explained that pre-accusation delay is "unreasonable" whenever the defendant has been able to show that the delay was caused by "governmental negligence" (*id.* at 195).[11]

[11] Accord, *United States* v. *Jackson*, 504 F. 2d 337, 339–341 (C.A. 8), certiorari denied, 420 U.S. 964. In other recent cases, the Eighth Circuit has explained that pre-accusation delay is "unreasonable" if it is not affirmatively justified by the government and that "as the delay increases, the specificity with which prejudice must appear, diminishes" (*United States* v. *Naftalin*, 534 F. 2d 770, 773,

The negligence standard adopted by the Eighth Circuit in this and other recent cases renders this

certiorari denied, No. 75–1720, October 4, 1976). *United States* v. *Page*, No. 76–1[illegible]2, decided November 23, 1976 (slip op. 3); *United States* v. *Quinn*, 540 F. 2d 357, 360–362; *United States* v. *Librach*, 520 F. 2d 550, 554–555; *United States* v. *Norton*, 504 F. 2d 342, 344–345, certiorari denied, 419 U.S. 1113; see also *United States* v. *Washington*, 504 F. 2d 346, 347–348.

Three other circuits appear to agree with the Eighth Circuit that a defendant claiming a violation of due process because of pre-accusation delay need not show that the government delayed accusation for improper tactical reasons. *United States* v. *Sand*, 541 F. 2d 1370, 1373–1374 (C.A. 9); *United States* v. *Erickson*, 472 F. 2d 505, 507 (C.A. 9); *United States* v. *Wilson*, 357 F. Supp. 619 (E.D. Pa.), affirmed, 517 F. 2d 1400 (CA. 3); *United States* v. *Dukow*, 453 F. 2d 1328, 1330 (C.A. 3), certiorari denied *sub nom. Crow* v. *United States*, 406 U.S. 945; *United States* v. *Alred*, 513 F. 2d 330, 332 (C.A. 6); *United States* v. *Giacalone*, 477 F. 2d 1273, 1276–1277 (C.A. 6). On the other hand, at least four circuits have stated that they require such a showing, although they have not yet been presented with a case in which the defendant has established that the delay prejudiced his ability to defend. *United States* v. *Scallion*, 533 F. 2d 903, 911–912 (C.A. 5); *United States* v. *Duke*, 527 F. 2d 386, 390 (C.A. 5), certiorari denied, June 21, 1976, No. 75–6564; *United States* v. *Joyce*, 499 F. 2d 9, 19–20 (C.A. 7); *United States* v. *Ricketson*, 498 F. 2d 367, 370–371 (C.A. 7); *United States* v. *Beitscher*, 467 F. 2d 269, 272 (C.A. 10); *United States* v. *Daley*, 454 F. 2d 505, 508 (C.A. 1).

The Second Circuit has expressly reserved ruling on the issue presented here. *E.g.*, *United States* v. *Vispi*, No. 76–1250, decided November 15, 1976 (slip op. 516–517 and n. 4); *United States* v. *Finkelstein*, 526 F. 2d 517, 521. Using its supervisory powers "but mindful of the due process overtones of the problem" (*United States* v. *Jones*, 524 F. 2d 834, 840), the Court of Appeals for the District of Columbia Circuit has adopted an approach to pre-accusation delay in narcotics cases similar to that employed by the Eighth Circuit in this case. *E.g.*, *Robinson* v. *United States*, 459 F. 2d 847; *Woody* v. *United States*, 370 F. 2d 214; *Daniels* v. *United States*, 357 F. 2d 587; *Bey* v. *United States*, 350 F. 2d 467; *Ross* v. *United States*, 349 F. 2d 210. Defendants in other types of cases in the District of Columbia Circuit appar[illegible]ust demonstrate both prejudice and improper motivation by the government. *United States* v. *Bridgeman*, 523 F. 2d 1099, 1111–1112.

Court's decision in *Marion* largely meaningless. The Eighth Circuit has held in effect that the Due Process Clause guarantees speedy accusations in much the same way that the Sixth Amendment guarantees speedy trials. Consistently with this view of the Due Process Clause, the standard employed by the court for assessing the permissibility of pre-accusation delay is the functional equivalent of the standard adopted by this Court in *Barker* v. *Wingo,* 407 U.S. 514, for assessing the permissibility of post-accusation delay. In fact, in one recent case, *United States* v. *Barket, supra,* the Eighth Circuit relied explicitly upon *Barker* for the proposition that negligence or inadvertence by the government, delaying the obtaining of an indictment and prejudicing the defense, violates the Due Process Clause (530 F. 2d at 193).

But as *Marion* makes clear, the situation of a potential defendant does not compare with the situation of a defendant who has been arrested and held to answer or otherwise formally accused of criminal conduct. The Eighth Circuit's approach to pre-accusation delay also ignores substantial public policies—of benefit both to potential defendants and to society as a whole—that that would be disserved by rules that encourage premature public accusation of persons suspected of having engaged in criminal conduct. The standard employed by the Eighth Circuit also involves perhaps insuperable practical difficulties, without providing assurance of more equitable results than those produced by application of the relevant statute of limitations.

1. The approach to pre-accusation delay exemplified by the decision in this case ignores significant differences in the status of persons before and after formal accusation

This Court's determination in *Marion* that the obligations imposed by the Sixth Amendment's speedy trial provision are triggered by formal accusation, rather than by some prior act or omission attributable to the government, was deeply rooted in the policies subsumed by that guarantee—policies that cannot casually be transferred to the due process inquiry in cases of pre-accusation delay. Despite the presumption of innocence to which persons charged with criminal offenses are entitled, the making of a formal accusation—whether signified by arrest and holding to answer or by the issuance of criminal charges—almost inevitably alters the status of the subject to his detriment. Arrest is a public act that carries the implication that the government has probable cause to believe that the person arrested has committed a crime. The arrest and lodging of a criminal charge "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and * * * may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends" (*United States* v. *Marion, supra,* 404 U.S. at 320).[12]

[12] Accord, *Dillingham* v. *United States*, 423 U.S. 64. When we speak of an arrest triggering the protections of the Sixth Amendment, we are referring of course to one followed by a formal complaint and the holding of the arrested individual to answer criminal charges, as by being bound over to await the action of a grand jury following a preliminary hearing. When an individual is ar-

The issuance of an indictment or information has precisely the same effects. Moreover, "[i]nordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense"—although "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense" (*ibid.*).[13]

Thus, once a person has been formally accused of a crime, the Constitution explicitly enjoins the prosecution and the judiciary to proceed with "orderly expedition" (*Smith* v. *United States,* 360 U.S. 1, 10). Determining whether a particular criminal prosecution has proceeded with orderly expedition or at an appropriately "deliberate pace" (*United States* v. *Ewell,* 383 U.S. 116, 120) requires courts to engage in a sensitive balancing process—taking into consideration the length of the delay between formal accusation and trial, the reasons for the delay, the defendant's assertion of his right, and prejudice consequent upon the delay. *Barker* v. *Wingo, supra,* 407 U.S. at 530–533. This balancing process must be carried out "with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution" (*id.* at 533) and is of a "fundamental" nature (*Klopfer* v. *North Carolina,* 386 U.S. 213, 223).[14]

Prior to formal accusation, the interests of a potential defendant and of a society concerned with the even-handed enforcement of the criminal laws are quite different. As this Court pointed out in *Marion,* prior to arrest or charge "a citizen suffers no restraints on his liberty and is not the subject of public accusation * * *" (404 U.S. at 321). The impact on job, family, and personal finances is generally nonexistent or far less severe prior to formal accusation than after. Although the fact that criminal investigation is in progress may become known on occasion to persons not involved in the investigation, any rumors that may surface concerning the identity of potential defendants seldom will be as damaging to those persons as the act of formal accusation—which, because of its official nature and the status of those responsible for it, will serve almost inevitably to transform any preexisting rumor into apparently justified suspicion. Similarly, while we recognize that anxiety may

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rested but then released without being held to answer criminal charges, the protections of the Speedy Trial Clause would not attach until formal charges are brought. *E.g., United States* v. *Bishton,* 463 F. 2d 887, 891 (C.A. D.C.); but see *United States* v. *MacDonald,* 531 F. 2d 196, 204–205 (C.A. 4), petition for a writ of certiorari pending, No. 75–1892.

[13] Indeed, as this Court pointed out in *Barker* v. *Wingo,* 407 U.S. 514, 521, delay in the prosecution of criminal charges actually may operate to the defendant's advantage at trial. Since the prosecution carries the burden of proof, the prosecution is often more vulnerable than the defense to any delay that results in the loss of relevant evidence. See *Dickey* v. *Florida, supra,* 398 U.S. at 46 n. 10 (Brennan, J., concurring). Delay may also enable defendants "to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system" (*Barker* v. *Wingo, supra,* 407 U.S. at 519).

[14] Accord, *Dickey* v. *Florida, supra,* 398 U.S. at 37; *Smith* v. *Hooey,* 393 U.S. 374, 375.

The period following formal accusation is now also governed by the Speedy Trial Act of 1974, 88 Stat. 2076, 18 U.S.C. (Supp. IV) 3161 *et seq.*, and local rules adopted pursuant to that statute. See also Rule 50(a), (b), Fed. R. Crim. P.

be suffered by persons with knowledge of an ongoing criminal investigation touching upon their activities, that anxiety, in the usual case, is increased measurably by formal accusation—with its heightened prospect of a criminal trial and eventual punishment. In sum, in most relevant respects the situation of a potential defendant "does not compare with that of a defendant who has been arrested and held to answer" (*United States* v. *Marion, supra,* 404 U.S. at 321) or charged formally with criminal activity. Cf. *Kirby* v. *Illinois,* 406 U.S. 682, 689–691.

There is another, and quite significant, respect in which the impact of pre-accusation delay on a potential defendant is different from the effect of post-accusation delay on an actual defendant. During a period of pre-accusation delay, whether such delay is a product of further investigation of the case or simple inertia, additional facts may come to light showing that the person originally under suspicion was not actually involved in the matter being investigated, that no criminal conduct occurred, or that the case is an appropriate one for a discretionary decision not to prosecute.[15] Thus, delaying arrest or charge may serve to avoid placing a suspect in the position of having been accused publicly of criminal activity. Even if

[15] As this Court pointed out in *Kirby* v. *Illinois, supra,* 406 U.S. at 689:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point for our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute,

ultimately indicted, moreover, the delay may shorten the period between the bringing of charges and the defendant's opportunity to secure an acquittal on those charges at trial.

Given these substantial differences in the status of persons before and after formal accusation, this Court's refusal in *Marion* to extend the protections of the speedy trial provision of the Sixth Amendment to the period preceding formal accusation is readily understandable.[16] Those considerations support the basic thrust of this Court's decision in *Marion* that

> and only then that the adverse positions of government and defendant have solidified. * * *

See also *United States* v. *Finkelstein, supra,* 526 F.2d at 526 ("The deliberate pace of the investigation redounded to society's benefit in two ways: it protected an innocent party and ferreted out two who were culpable."); *United States* v. *Capaldo,* 402 F.2d 821, 823 (C.A. 2), certiorari denied, 384 U.S. 989 ("It is usually in the public interest, and frequently to the advantage of the prospective defendant, that charges not be brought until the prosecutor has completed his investigation and feels that there is sufficient likelihood of gaining a conviction."); *United States* v. *Feinberg,* 383 F.2d 60, 64–65 (C.A. 2) ("Time-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons."); *United States* v. *Hauff,* 395 F.2d 555, 557 (C.A. 7).

[16] Since respondent did not become an "accused" until he was indicted on March 6, 1975, his reliance upon Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment was misplaced. Respondent moved to dismiss the charges against him on March 18, 1975 (A. 6–7), within two weeks of his indictment. The delay of which he complained preceded his formal accusation and consequently was not governed by Rule 48 of the Sixth Amendment. See *Dillingham* v. *United States, supra,* 423 U.S. 64; *United States* v. *Marion, supra,* 404 U.S. at 313, 319.

the government will not ordinarily be called upon to justify pre-accusation delay. We believe that any exception to this principle should be narrowly circumscribed, extending only, as the *Marion* opinion suggests, to the rare case in which the defendant can demonstrate that the delay stemmed from invidious motivations and caused substantial prejudice to his defense.

2. The Due Process Clause does not require courts to consider on an ad hoc basis the timeliness of criminal charges that are brought within the applicable statute of limitations and are not the product of prosecutorial overreaching

This Court has interpreted the Due Process Clause as "a summarized constitutional guarantee of respect for those personal immunities which * * * are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * * or are 'implicit in the concept of ordered liberty' " (*Rochin* v. *California,* 342 U.S. 165, 169; citing *Snyder* v. *Massachusetts,* 291 U.S. 97, and *Palko* v. *Connecticut,* 302 U.S. 319). The right to a fair trial is indisputably fundamental in nature; it is, in fact, the goal of many specific constitutional guarantees. And whether the offending party has been a state or the federal government, the Due Process Clause has served to ensure that criminal trials are conducted within the bounds dictated by "fundamental fairness" (*Duncan* v. *Louisiana,* 391 U.S. 145, 171, 186–187 (Harlan, J., dissenting)) and the "community's sense of fair play and decency" (*Rochin* v. *California, supra,* 342 U.S. at 173). See, e.g., *United States* v. *Agurs,* No. 75–491,

decided June 24, 1976; *Brady* v. *Maryland,* 373 U.S. 83.[17]

Although a defendant's due process right to a fair trial may be violated in certain circumstances despite the absence of affirmative governmental overreaching or bad faith (see *United States* v. *Agurs, supra,* slip op. 12–13; *Brady* v. *Maryland, supra,* 373 U.S. at 87), we know of no case not involving a breach of some duty owed by the government to the defendant in which this Court has found a violation of the Due Process Clause. The requirement of due process does not provide courts with a roving commission to oversee performance by the Executive Branch of its law enforcement responsibilities, exercising a "chancellor's foot" veto over acts or omissions that they consider unjustified or undesirable. Cf. *United States* v. *Russell,* 411 U.S. 423, 435. Particularly in applying the severe remedy of barring the prosecution of persons who are charged with crime, a disciplined and circumscribed exercise of judicial power is called for—one that looks to "all the circumstances" (*Hampton* v. *United States,* 425 U.S. 484, 494 n. 6 (Powell, J., concurring). In the instant context, the circumstances that must be taken into account include those affecting persons having to defend against criminal charges, to be sure, but also those affecting the related, but somewhat broader,

[17] See also *In re Winship,* 397 U.S. 358, 359, and *In re Gault,* 387 U.S. 1, 30, interpreting the Fourteenth Amendment as requiring the adjudicatory phase of state juvenile proceedings to be conducted in accordance with "the essentials of due process and fair treatment."

societal interest in public justice. Cf. *United States* v. *Mandujano,* 425 U.S. 564, 590 (Brennan, J., concurring).

A number of public policies strongly counsel against a construction of the Due Process Clause obligating the government to institute formal criminal proceedings as soon as it might be thought to have probable cause to do so. As already noted, such a requirement—which underlies the court of appeals' decision in the present case—ignores the possibility that decisions to delay formal accusation pending further investigation may benefit potential defendants as well as society generally, particularly if such investigation reveals that the person originally under suspicion was not involved in the matter being investigated or that no criminal conduct occurred. Further investigation may also result in the discovery of related or similar criminal conduct by persons in addition to those originally under suspicion. By ignoring these considerations, the standard for assessing pre-accusation delay employed by the court of appeals encourages haste on the part of law enforcement personnel—at the expense of deliberateness designed to avoid unjustified accusations, of efforts to effectuate the speedy trial mandate of the Sixth Amendment by shortening the period between formal accusation and trial, and of the obvious societal interest in requiring persons guilty of criminal offenses to answer for their conduct.[18] Indeed, so long as formal accusation is de-

[18] See, *e.g.*, *United States* v. *Feinberg*, *supra*, 383 F. 2d at 67 (original emphasis) ("[F]ear of forfeiting a prosecution would frequently induce *unreasonable* speed which 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.' ").

layed to permit further investigation, we believe that such delay can never be considered unjustified. See *United States* v. *Watson,* 423 U.S. 411, 431 (Powell, J., concurring).

At the same time, the court of appeals' definition of "delay" puts prosecutors at risk of violating the Fourth Amendment if they act too soon in arresting persons suspected of criminal conduct and of violating the Fifth Amendment if they wait too long and evidence is lost fortuitously. This Court recognized a similar dilemma in *Hoffa* v. *United States,* 385 U.S. 293. The petitioner in *Hoffa,* relying upon *Escobedo* v. *Illinois,* 378 U.S. 478, argued that since he would have had a right to counsel under the Sixth Amendment had the government taken him into custody and charged him with an offense, he should have been entitled to the same right at the moment the government had sufficient evidence to do so. In rejecting that argument, this Court stated (385 U.S. at 309–310):

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish

> probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction [Footnote omitted].[19]

It is exceedingly difficult to square this Court's assessment in *Hoffa* of the government's responsibility formally to accuse persons suspected of criminal conduct with the view of that responsibility taken by the court of appeals in the present case.

The court of appeals' construction of the Due Process Clause also would interfere in an unwarranted manner with the functioning of the grand jury. The "historic office" of the grand jury in our system of criminal justice "has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens * * *" (*United States* v. *Mandujano, supra,* 425 U.S. at 571). It is essential to the successful performance of this function that the grand jury be afforded both the means of pursuing evidence of criminal conduct and sufficient time in which to do so carefully and dispassionately; to those ends, the law has "vest[ed] the grand jury with substantial powers, because '[t]he grand jury's investigative powers must be broad if its public responsibiilty is adequately to be discharged' " (*id.* at 7; citing *United States* v. *Calandra,* 414 U.S. 338, and *Branzburg* v. *Hayes,* 408 U.S. 665).

Once the grand jury has returned an indictment against an individual believed to have engaged in

[19] This Court referred approvingly in *Marion* to the passage from the opinion in *Hoffa* quoted above (404 U.S. at 325 n. 18).

criminal conduct, there may be substantial restrictions upon its power to inquire further into that matter. See *United States* v. *Doe,* 455 F. 2d 1270, 1273 (C.A. 1). These limitations proceed from the fact that the return of an indictment fundamentally alters the status of the person accused and, consistently with that altered status, changes the predominant character of the proceedings from investigation to adjudication. If the grand jury is required to act upon incomplete information, following an investigation by the police or prosecutor terminated prematurely at the point of mere probable cause, the problems that concerned this Court in *Hoffa* will be compounded appreciably. Decisions by the grand jury based upon less than complete investigation can only increase the incidence of unwarranted accusation, at the expense of persons wrongfully accused, and at the same time permit some of those guilty of criminal offenses to escape sanction for their wrongdoing, at the expense of public justice. And even if the grand jury is able to identify and accuse those guilty of criminal conduct, the act of formal accusation both restricts access by law enforcement personnel to additional evidence that may be needed to prove guilt beyond a reasonable doubt—particularly if that evidence is possessed or controlled by the defendant—and limits the time during which such further investigation may take place. Cf. *Massiah* v. *United States,* 377 U.S. 201.

We do not mean to suggest that the public policies making delay in formal accusation, despite the existence of probable cause, a tolerable and often desirable ingredient of the criminal process eliminates all con-

cern with expeditious enforcement of the criminal laws.[20] But at least when pre-accusation delay is not the result of overreaching by the government to gain an improper tactical advantage, the Due Process Clause does not require courts to consider on an *ad hoc* basis the timeliness of criminal charges brought within the applicable statute of limitations.[21]

[20] The mere fact that a person may have been in a better position to present an effective defense at the time the particular conduct occurred than he was at some later time is hardly sufficient, of itself, to support the conclusion that trial at such later time is offensive to the Due Process Clause. As this Court observed in *United States* v. *Marion*, *supra*, 404 U.S. at 324–325 (footnote omitted), "no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." In assessing the significance of prejudice to the defense under the Due Process Clause, it also is important to bear in mind that criminal defendants often are required to respond to pending charges despite the unavailability of evidence potentially useful to their defenses. For example, although criminal defendants may subpoena witnesses to testify on their behalf, they are not entitled to immunity from trial simply because the person against whom the subpoena was directed is beyond the jurisdiction of the court and refuses voluntarily to return or because the person cannot be located. Neither is a defendant's right to a fair trial violated if persons believed to possess information useful to the defense refuse to make that information available because of possible self-incrimination. See, *e.g.*, *United States* v. *Morrison*, 535 F. 2d 223, 228–229 (C.A. 3). In all of these instances, the interest of the defendant in presenting the most effective defense possible is subordinated, consistently with the Due Process Clause, to other interests of a more compelling nature.

[21] The fact that a showing of governmental overreaching or bad faith is not required to gain a new trial following the suppression of material evidence favorable to the defense (see *United States* v. *Agurs*, *supra*, slip op. 12–13; *Brady* v. *Maryland*, *supra*, 373 U.S. at 87) does not support the proposition that pre-accusation delay may offend the Due Process Clause even if not engaged in by the

One of the purposes of statutes of limitation, which stand as "the primary guarantee against bringing overly stale criminal charges" (*United States* v. *Ewell, supra,* 383 U.S. at 122), is to guard against the possibility that the passage of time may impair the ability to mount an effective defense. They also serve the more general function of balancing society's interest in equitable law enforcement and the interest of potential defendants in not having to defend against charges of long-past criminal conduct. In performing these functions, statutes of limitation may have "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity" (*Toussie* v. *United States,* 397 U.S. 112, 115).[22] But

government to prejudice the defense. A conviction obtained following suppression by the prosecution of material evidence favorable to the defendant violates the Due Process Clause both because of the direct connection between such conduct and the integrity of the verdict and because the suppression of such evidence is never justified by any overriding public policies. But unless the prosecution has delayed accusation for the purpose of prejudicing the defense, or perhaps proceeded in reckless disregard of circumstances known to it calling for the expeditious bringing of charges (see n. 25 *infra*), the occurrence of prejudice to the defense because of pre-accusation delay is simply fortuitous. And the remedy for a *Brady* violation is the award of a new trial at which guilt or innocene may be fairly determined, not the severe remedy of barring adjudication of the charges that results from a finding of impermissible delay. As noted, moreover, delaying formal accusation beyond the point at which it might have been possible to charge the defendant often serves substantial public policies and benefits potential defendants.

[22] The possibility that evidence may become unavailable and thus successful prosecution may become more difficult if formal criminal proceedings are delayed provides an additional, and often quite strong, incentive to prompt action by law enforcement personnel. This diminishes the practical need for strict rules against pre-accusation delay.

whether such investigation is fruitful or not, and despite the possibility that in particular cases the passage of time may not have prejudiced the ability to present all relevant evidence, statutes of limitation afford a measure of predictability by specifying the point at which a general policy of repose outweighs the desirability of further use of the criminal process.[23] See, *e.g., Bridges* v. *United States,* 346 U.S. 209, 215–216.

[23] Even before the first ten amendments to the Constitution had been ratified, Congress enacted a federal statute of limitations. That statute imposed a three-year limit on the filing of charges in capital cases and a two-year limit on the filing of charges in non-capital cases. 1 Stat. 112, 119. In 1876, Congress extended the general limitation applicable to non-capital offenses to three years (19 Stat. 32, 33) and in 1954 extended it to five years (68 Stat. 1145, 18 U.S.C. 3282). In 1939, Congress removed the time limitation as to treason and other capital offenses. 53 Stat. 1198, 62 Stat. 827; 18 U.S.C. 3281. See generally Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecutions*, 102 U. Pa. L. Rev. 630 (1954).

Congress also has enacted several statutes of limitation to govern special circumstances and offenses. By the Act of March 26, 1804, 2 Stat. 290, Congress provided that indictments for offenses arising under the customs and slave trade laws could be returned at any time within five years of the commission of those offenses. 18 U.S.C. 3283. A statute enacted by Congress in 1914 bars prosecution for criminal contempt unless such prosecution is begun within one year of the violation. 38 Stat. 740, 18 U.S.C. 3285. In 1921, Congress extended the general limitations period for defrauding the government from three to six years in recognition of the fact that complex cases arising from World War I made such extension necessary. 42 Stat. 220; H.R. Rep. No. 365, 67th Cong., 1st Sess. (1921). After those cases had been disposed of, Congress again shortened the limitations period to three years. 42 Stat. 51. During World War II, Congress enacted a special statute of limitations governing fraud against the government in time of war, suspending until the termination of hostilities the three-year limitation applicable to those offenses. 56 Stat. 747; 58 Stat. 649, 667; 58 Stat. 765, 781; 18 U.S.C. 3287.

Certain tax offenses may be charged up to six years from their commission. 68A Stat. 815, 26 U.S.C. 6531. The offense of concealing a bankrupt's assets is deemed to be a continuing offense until the bankrupt is finally discharged or discharge is denied. 62 Stat. 828, 18 U.S.C. 3284. In 1950, Congress enacted a statute providing that violations of the espionage laws could be charged within ten years of those offenses. 64 Stat. 1005, 18 U.S.C. 792 (note). Congress extended the period for prosecuting passport offenses in 1951 after finding that most violations of the passport laws were not discovered until after the previously applicable three-year limitation had expired. 65 Stat. 107, 18 U.S.C. 3291; S. Rep. No. 384, 82d Cong., 1st Sess. 1–2 (1951).

Statutes of limitation thus represent a generalized approach to the permissibility of pre-accusation delay and reflect a legislative assessment of the fairness of bringing the machinery of government to bear upon individual citizens. In the usual case, judicial scrutiny of pre-indictment or pre-arrest delay under the Due Process Clause, as this Court has interpreted that constitutional provision, would involve the courts in the same process. Whether pre-accusation delay were judged by the courts in light of "fundamental fairness" or the "community's sense of fair play and decency," the courts would have to weigh the same factors weighed by Congress in enacting statutes of limitation. Absent extraordinary circumstances, not present here, "[s]uch legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay." *Dickey* v. *Florida, supra,* 398 U.S. at 47 (Brennan, J., concurring).

We acknowledge again, however—as we did in *Marion*—that pre-accusation delay by the government designed to deprive the defendant of a fair trial, and having that effect,[24] violates the Due Process Clause even if the prosecution is brought within the applicable statute of limitations. See, *e.g., Dickey* v. *Florida, supra,* 398 U.S. at 46, 51 (Brennan, J., concurring); *Pollard* v. *United States,* 352 U.S. 354, 361; *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md.), affirmed *per curiam,* 350 U.S. 857.[25] Statutes of limitation represent a legislative balancing of legitimate interests in fair and even-handed law enforcement; they were not intended to immunize from constitutional challenge law enforcement efforts, however unfair, occurring within the applicable limitations period.

The fact that statutes of limitation "represent legislative assessments of relative interests of the State

[24] The reason that a defendant who is able to show that the government delayed accusing him to gain an improper tactical advantage must also demonstrate that the delay impaired his ability to defend is simply to avoid conferring a windfall upon the defendant at society's expense. If the misconduct fails to achieve its intended objective of depriving the defendant of a fair trial, the Due Process Clause does not require the termination of the prosecution. The law has provided other remedies for such misconduct, short of immunizing from even a fair trial one who may be guilty of criminal conduct. See, *e.g., Imbler* v. *Pachtman,* 424 U.S. 409, 428–429; *O'Shea* v. *Littleton,* 414 U.S. 488, 503; *United States* v. *Acosta,* 526 F. 2d 670 (C.A. 5), certiorari denied June 7, 1976, No. 75–1368.

[25] A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. Nothing in this case suggests that respondent could establish a delay of this nature.

3. A basically ad hoc approach to pre-accusation delay would entail unacceptable costs to the criminal justice system without providing assurance of fairer results than those produced by application of the relevant statute of limitations

and the defendant in administering and receiving justice" (*United States* v. *Marion, supra,* 404 U.S. at 322) does not, of itself, necessarily mean that courts should refrain from reassessing those interests on a case-by-case basis—even when prosecutorial misconduct is not at issue. We believe, however, that there are sound reasons why courts should refrain. A basically *ad hoc* approach to the permissibility of pre-accusation delay would entail enormous costs to the criminal justice system—without, in the vast majority of cases, providing assurance of fairer results. Furthermore, an *ad hoc* approach would require courts to engage in lengthy hearings and to resolve a variety of essentially policy disputes that transcend the individual case.

The difficulties inherent in a basically *ad hoc* approach to pre-accusation delay begin with the need to ascertain at what point the government reasonably might be charged with having "delayed" formal accusation. The court of appeals' decision in the present case is premised in part on the notion that "delay" chargeable to the government commences

whenever the government possesses sufficient evidence to warrant submission to a grand jury. In many cases, the making of such determination would involve nearly insuperable problems of proof. Prosecutors can hardly be expected continuously to reassess the status of individual cases as each new piece of evidence is discovered. Neither can they be expected in every case to keep detailed records from which it could readily be ascertained when evidence accumulated to the point of probable cause to believe that a particular person committed the offense of which he is later accused. And even if it were possible to reconstruct the course of an investigation in the kind of detail the court of appeals' decision would require, fixing the point at which the government might successfully have sought an indictment would place courts in the unenviable position of having to divine the likely reaction of members of a hypothetical grand jury to evidence possessed by the government at various points in time.[26]

[26] In determining the point at which the government successfully might have sought an indictment against respondent, the panel majority relied in part on testimony from the postal inspector responsible for investigating the thefts from the Terminal Railroad Association. The postal inspector had testified at the hearing on respondent's motion to dismiss to the effect that "he would have recommended the prosecution of this case and presentation of the evidence to the grand jury based on the information contained in the report submitted to the United States Attorney on October 2, 1973" (Pet. App. 4a). Although such a recommendation may be useful to prosecutors in deciding whether and when to seek formal charges, an investigating officer is not in a position to make a valid assessment of the complex of factors that must be considered in making such decisions. Consequently, a recommendation such as that relied upon by the panel majority is hardly entitled to conclusive weight in determining the point at which charges should have been brought.

Given the court of appeals' view of the Due Process Clause, moreover, the court's premise that delay chargeable to the government begins whenever the government possesses sufficient evidence to indict is too restricted. If the court is correct in construing the Due Process Clause as embodying a prompt accusation requirement, it makes little sense to limit that duty to government prosecutors. Potential defendants may be adversely affected by "delay" in the discovery and investigation of criminal conduct as well as by "delay" following the accumulation of evidence establishing probable cause. In fact, since potential defendants often do not learn that they may be called upon to defend against criminal charges until the point at which an investigation begins to focus upon them, requiring such investigations to proceed efficiently and expeditiously would seem to be an inevitable concomitant of the court of appeals' approach.[27] The obvious difficulties that would attend judicial efforts to supervise the conduct of criminal investigations, by reviewing them at the behest of defendants after

[27] Indeed, it is difficult rationally to distinguish respondent's position from the position he would have been in had evidence of the offenses charged in the indictment not been discovered for seventeen months. But with the possible exception of the Eighth Circuit's recent decision in *United States* v. *Barket*, *supra*, we know of no case holding that a defendant's right to due process may be violated if evidence is lost during a period when the prosecuting authority was unaware of the apparent violation of the criminal laws.

formal accusation and dismissing criminal charges stemming from investigations not conducted with satisfactory dispatch, would have serious import for the administration of criminal justice. Cf. *United States* v. *Russell, supra,* 411 U.S. at 435.

An additional difficulty inherent in recognition of a general prompt accusation requirement under the Due Process Clause is that lengthy hearings—similar in character to the trial itself—would be necessary before the pertinent determinations could be made with any assurance. In fact, whether the court's ultimate decision rested on the Sixth Amendment or the Fifth Amendment, the practical problems that would be created by efforts to identify the point at which the police could have arrested or the prosecutor could have charged would be essentially the same. As this Court noted in *Marion,* in discussing those problems in the context of the Sixth Amendment (404 U.S. at 321 n. 13; quoting approvingly from *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial* 23 (Commentary to Rule 2.2(a), p. 23 (Approved Draft, 1968)):

> To recognize a general speedy trial right commencing as of the time arrest or charging was possible would have unfortunate consequences for the operation of the criminal justice system. Allowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court said, "the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting

> authorities had proceeded diligently or otherwise" [*United States* v. *Port,* Crim. No. 33162 (ND Cal., June 2, 1952); quoted in Note, *Justice Overdue—Speedy Trial for the Potential Defendant,* 5 Stan. L. Rev. 95, 101–102 n. 34].

The Eighth Circuit's approach to pre-accusation delay ignores the considerations discussed above and requires courts to attempt to pinpoint the precise moment at which the government might successfully have sought an indictment. It then holds society accountable, by the stringent measure of dismissing the pending criminal charges, for the loss thereafter of evidence favorable to the defense. In addition to involving perhaps insuperable practical difficulties, this approach to pre-accusation delay would upset the balance struck by Congress in enacting statutes of limitation—a balance that takes into account the variety of institutional considerations that may delay formal accusation, recognizes that some delay between the commission of offenses and the bringing of charges is a necessary and desirable part of the criminal process, and, after the expiration of a fixed period of time, eliminates further exposure to criminal sanction for those acts Congress has proscribed. Absent a showing that the government delayed formal accusation to secure an improper tactical advantage over the accused, we submit that the bringing of criminal charges within the period allowed by the applicable statute of limitations comports with the requirements of due process.

B. ANY PRE-ACCUSATION DELAY THAT OCCURRED IN THIS CASE DID NOT VIOLATE THE DUE PROCESS CLAUSE

The statute of limitations applicable to the offenses for which respondent was indicted authorizes the bringing of criminal charges at any time within five years following the commission of those offenses. 18 U.S.C. 3282.[28] As already noted, the indictment was returned within 20 months of the dates of the alleged offenses. Respondent has neither alleged nor sought to show that the government delayed charging him in order to secure an improper tactical advantage.[29] In these circumstances, we submit that the timeliness of the charges against respondent was governed solely by the applicable statute of limitations and that the courts below therefore erred in dismissing certain of those charges because of pre-accusation delay.

In holding that the government had delayed unreasonably in charging respondent, the panel majority acknowledged that the government was seeking during the period of the "delay" to identify persons in addition to respondent who may have participated in the offenses specified in the indictment (Pet. App. 5a).[30] Moreover, the three counts of the

[28] 18 U.S.C. 3282 states that, "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

[29] Neither did respondent allege or seek to show that the government had misled him into believing that he would not be charged and that he had relied upon that belief to his detriment (see Pet. App. 9a (Henley, J., dissenting)).

[30] We stress again our belief that a decision by the government to delay formal accusation pending further investigation should never be considered to violate due process standards. See discussion at pp. 24–25, *supra*.

indictment dismissed by the court charged respondent with unlawfully possessing eight handguns stolen from the mails, in violation of 18 U.S.C. 1708 (A. 3–4). An essential element of the government's affirmative case with respect to those offenses was proof that respondent had known that the handguns were stolen. *Barnes* v. *United States,* 412 U.S. 837, 847. Respondent admitted that he had possessed the handguns, but he denied having known that they had been stolen (A. 24). Although the government believed otherwise, it did not have direct evidence of respondent's guilty knowledge. The theory upon which the government was proceeding, supported only by circumstantial evidence, was that respondent's son had stolen the guns and had given them to respondent to sell (see n. 7, *supra*).

Thus, this is not a case in which the government possessed at some point overwhelming evidence showing that a particular individual had engaged in criminal conduct—and in which ensuing pre-indictment delay thus might have been consistent with an assertion that the purpose of the delay was to secure an improper tactical advantage. It is hardly improper for the government to delay formal accusation until it has evidence demonstrating with fair assurance that the person believed to have committed a criminal offense did so in fact. Indeed, as Mr. Justice Powell has pointed out, "[g]ood police practice often requires postponing an arrest, even after probable cause has been established, in order to * * * develop further evidence necessary to prove guilt to a jury" *United*

States v. *Watson, supra,* 423 U.S. at 431 (concurring). In light of respondent's failure to allege in his motion to dismiss that any delay in accusing him was improperly motivated, and in the absence of evidence showing that it was so motivated, any pre-accusation delay that occurred here did not offend the Due Process Clause.

II.

A DISTRICT COURT SHOULD RESERVE RULING ON A DUE PROCESS CLAIM BASED UPON PRE-ACCUSATION DELAY, AND ALLEGING BOTH GOVERNMENTAL MISCONDUCT AND CONSEQUENT PREJUDICE, UNTIL THE CONCLUSION OF TRIAL

The decision in this case also departs from previously accepted standards by endorsing a procedure for resolving due process claims based upon pre-accusation delay that, in practical effect, significantly dilutes the requirement that the defendant demonstrate that the delay caused actual and substantial prejudice to his ability to defend against the charges. While it may sometimes be feasible, and not unduly burdensome, for a court to determine with assurance prior to trial whether the government sought to delay formal accusation in order to secure an improper tactical advantage, the same will seldom be true of allegations of defense prejudice. At a minimum, requiring the government to respond, prior to trial, to allegations that a particular delay impaired the accused's ability to defend against the charges will require a dress rehearsal of the trial itself. The resulting expenditure of judicial and prosecutorial resources, the delay in commencement of the trial,

and the inevitable inconvenience to witnesses and others, is not required to vindicate the policies served by the Due Process Clause.[31]

Although the Due Process Clause provides a basis for reversing criminal convictions resulting from trials lacking in fundamental fairness, it does not ordinarily afford any protection against being required to stand trial.[32] Due process claims based upon pre-accusation delay are, in that respect, significantly unlike a number of other constitutional claims arguably invoking a right not to be tried[33]—claims that are, as a consequence, appropriately dealt with by trial courts whenever possible prior to trial (cf. *Cohen* v. *Beneficial*

[31] Our concern here is with claims of pre-accusation delay that allege both governmental misconduct and consequent prejudice to the defense. If we are correct in believing that the Due Process Clause is not violated unless there has been both governmental misconduct and defense prejudice, a motion that fails to allege either misconduct or prejudice should of course be denied by the court prior to trial.

[32] As this Court noted in *Cobbledick* v. *United States*, 309 U.S. 323, 325, although "[a]n accused is entitled to scrupulous observance of constitutional safeguards", "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Cf. *Frisbie* v. *Collins*, 342 U.S. 519.

[33] As assertion that trial would offend the Double Jeopardy Clause is perhaps the clearest example of a claim invoking a right not to be tried. See *Breed* v. *Jones*, 421 U.S. 519, 532–533; *Green* v. *United States*, 355 U.S. 184, 187–188. Other claims arguably of a similar nature include claims under the Speech and Debate Clause (Article I, Sec. 6, cl. 1), which provides that a member of Congress "shall not be questioned in any other Place" for his official acts (see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491; cf. *Gravel* v. *United States*, 408 U.S. 606); a claim that trial is part of an effort on the government's part to "chill" the exercise

Industrial Loan Corp., 337 U.S. 541, 546). Motions seeking relief from pre-accusation delay allegedly offending the Due Process Clause are, moreover, virtually unique in the extent to which their resolution depends upon events of the trial itself.

Motions filed by defendants prior to trial (apart from those involving some aspect of discovery) generally seek either to avoid trial because of an alleged defect in the institution of the proceedings or to bar the admission of certain evidence. Rule 12(e) of the Federal Rules of Criminal Procedure requires trial courts to rule upon all such motions before trial, unless the court has "good cause" for deferring its determination.[34] Since most pre-trial motions can be dealt with almost as easily prior to trial as after trial, and since the parties have a shared interest in avoiding the occurrence at trial of prejudicial error, good cause seldom exists for reserving ruling. For example, a court confronted with a claim that a search and seizure violated the Fourth Amendment or that a confession was obtained illegally can focus its inquiry quite narrowly on the specific events surrounding the search

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of First Amendment rights (see *Dombrowski* v. *Pfister*, 380 U.S. 479; cf. *Allee* v. *Medrano*, 416 U.S. 802); and claims that the prosecution is racially discriminatory (cf. *Oyler* v. *Boles*, 368 U.S. 448; *Yick Wo* v. *Hopkins*, 118 U.S. 356).

[34] Rule 12(e) of the Federal Rules of Criminal Procedure provides in pertinent part that "[a] motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected." Because of this provision, motions challenging pre-accusation delay should not be granted during trial.

and seizure or the giving of the confession. In ruling upon such claims, moreover, the court need be apprised of the details of the offense with which the defendant is charged only insofar as those details bear upon the admissibility of the particular evidence at issue. Even more importantly, failure to rule upon such claims in a timely fashion may impair the government's right to appeal an adverse ruling, in violation of Rule 12(e) of the Federal Rules of Criminal Procedure, or inject reversible error that would require a second trial in the event the defendant is convicted. Moreover, events of the trial are unlikely to affect the appropriate disposition of most Rule 12 motions.

A motion to dismiss charges under the Due Process Clause because of pre-accusation delay presents a quite different situation. Even if the government delayed accusation in an effort to obtain an improper strategic advantage, the defendant is not entitled to have the charges against him dismissed unless he can demonstrate that the delay substantially prejudiced his ability to defend against the charges. *United States* v. *Marion, supra,* 404 U.S. at 324–326; and see n. 24, *supra.* But making that determination prior to trial inevitably entails considerable speculation about the nature and impact of evidence claimed to have been "lost" to the defense and the strength and character of the evidence available to the government at trial.

The issue of prejudice thus can be reliably determined only by reviewing all the evidence available to both sides—that is by the trial itself or by having a

"trial-before-the-trial." The latter course is undesirable in various respects. The evidence introduced by the government at trial may establish the defendant's guilt so overwhelmingly that the loss to the defense of certain evidence is plainly harmless beyond a reasonable doubt. Yet, prior to trial the loss of such evidence may well appear to have prejudiced significantly the defendant's ability to defend himself. Conversely, the evidence available to defense, despite any pre-accusation delay that has occurred, may be sufficient to persuade the jury that the government has not proved the defendant guilty beyond a reasonable doubt of the offenses with which he stands charged. The resulting acquittal would obviate any need for the court to rule on the defendant's due process claim.[35] At the same time, the prejudice asserted by the defendant based upon the loss of evidence may prove, in light of the evidence actually introduced at trial, to be unfounded because the government's theory of the case was other than originally assumed by the defense. The loss of particular evidence thus may be harmless because of its lack of materiality to the facts actually in issue at trial.[36]

[35] As Judge Henley pointed out in the present case (Pet. App. 10a–11a):

> If [respondent] had been put to trial, it would have been open to him to contend before the jury that he had acquired the pistols from Stewart without any guilty knowledge and to urge upon the jury the fact that Stewart's death had deprived [respondent] of the benefit of Stewart's testimony. As it is, [respondent] simply goes free without trial.

[36] In our judgment, the same considerations ordinarily caution against attempting to resolve prior to trial speedy trial claims under the Sixth Amendment. Unlike due process claims based upon pre-accusation delay, a demonstration of prejudice to the defense is neither "a necessary [n]or sufficient condition to the finding of a deprivation of the right of speedy trial" (*Barker* v. *Wingo*, *supra*, 407 U.S. at 533). But at least when the delay, attributable to the government, between formal accusation and trial is not so excessive that only minimal prejudice need be shown, we believe that resolution of a defendant's speedy trial claim should await conclusion of the trial. But see *United States* v. *MacDonald*, 531 F. 2d 196 (C.A. 4), petition for a writ of certiorari pending, No. 75–1892.

The dangers inherent in attempts to resolve due process claims prior to trial are, in fact, graphically illustrated by the decision in this case. At best, the finding of the panel majority on the issue of defense prejudice rests upon unsubstantiated speculation concerning both the nature and strength of the government's case against respondent and respondent's anticipated defense.[37] Respondent made no effort at the

[37] While we disagree with the determination that actual and substantial prejudice was established, we have not asked this Court to review that essentially factual conclusion, but rather the broader question of whether it was proper for the court to have attempted to resolve that issue prior to trial.

It is clear, however, that respondent's showing of prejudice fell far short of the showing that would have been required in other circuits to establish a violation of due process. See, *e.g.*, *United States* v. *McGough*, 510 F. 2d 598, 604 (C.A. 5) (mere allegation that several potential witnesses had died and that memories of others had faded held to constitute an insufficient showing of prejudice absent evidence of their potential utility to the defense); *United States* v. *Galardi*, 476 F. 2d 1072, 1075 (C.A. 9) (unexplicated claim that missing person might have been useful to the defense held insufficient); *United States* v. *Dukow*, *supra*, 453 F. 2d at 1330 (deaths of two potential witnesses insufficient to establish prejudice where the defense failed to show what their testimony would have been).

hearing on his motion to dismiss to explain what information his brother or Tom Stewart might have provided that would have been favorable to his defense. In finding that respondent's ability to defend had been impaired by Stewart's death, the majority below relied upon the contention of respondent's counsel in brief and argument—but not made at or supported by the testimony at the hearing—that "were Stewart's testimony available it would support [respondent's] claim that he did not know that the guns were stolen from the United States mails" (Pet. App. 5a).[38]

But respondent testified at the hearing that he had purchased from Stewart only "two or three" (A. 13) of the eight guns specified in the indictment, and it is by no means clear that Stewart would have been willing to testify on respondent's behalf.[39] As Postal Inspector Wellner's report indicates, moreover, the person to whom respondent sold all eight of the guns (Joe Boaz) admitted during questioning that he had

[38] To establish a violation of 18 U.S.C. 1708, the government need only show at trial that respondent knew that the guns had been stolen—not that they had been stolen from the United States mails. *Barnes* v. *United States*, *supra*, 412 U.S. at 847.

[39] As Judge Henley pointed out in his dissenting opinion (Pet. App. 10a):

> Had Stewart taken the stand and undertaken to exculpate [respondent], he doubtless would have been required to explain his own connection, if any, with the pistols in question, and that connection may well have been highly culpable. [Respondent] could not have compelled Stewart to incriminate himself, and it is unrealistic to believe that Stewart would have done so voluntarily simply to aid or accommodate [respondent].

known that the guns were "hot" when he resold them (A. 24). At trial, Boaz presumably would have been asked from whom he received that information, and since he had purchased the guns from respondent, the answer could well have shown that respondent also knew that the guns had been stolen.

By countenancing resolution of respondent's due process claim prior to trial, the majority of the court below ignored the procedures suggested by this Court in *Marion*. In that case, as here, the defendants relied "solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost" (404 U.S. at 325–326). This Court concluded, however, that while "[e]vents of the trial may demonstrate actual prejudice, * * * at the present time [defendants'] due process claims are speculative and premature" (*id.* at 326). The enhanced ability to make a sound assessment of claims of prejudice after trial, combined with the substantial economy of judicial and prosecutorial resources that will be accomplished by avoiding a lengthy pretrial hearing that inevitably will be largely duplicative of the trial itself (cf. *United States* v. *Calandra*, *supra*, 414 U.S. at 349–352; *United States* v. *Dionisio*, 410 U.S. 1, 17),[40] prove the soundness of

[40] Claims of defense prejudice based upon pre-accusation delay are easy to make and exceedingly difficult to refute, particularly prior to trial. As Judge Henley pointed out in his dissent in the present case (Pet. App. 9a–10a):

> The record and the briefs disclose that the indictment was returned on March 6, 1975; on March 18, 1975 [respon-

the rule, which we urge this Court to adopt, requiring that claims of prejudice such as respondent's normally be resolved after trial."[41]

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dent] filed his motion to dismiss; and a hearing was held on the motion on April 25, 1975. In his brief counsel for [respondent] states that his client testified that Stewart had died about six months prior to the hearing. If so, Stewart had ceased to be a source of danger to [respondent], if he ever was, when the motion was filed. Nevertheless, no mention of Stewart or his "lost testimony" is made in the motion, and there is no allegation of specific prejudice in the motion except the assertion that [respondent] had suffered "anxiety and concern" since his statement had been ttaken in 1973. The name of Stewart seems to have come up for the first time when [respondent] testified in support of his motion. In the circumstances, one may suspect that the claim of prejudice based on the death of Stewart was nothing but a fabrication, and that had Stewart been alive [respondent] could just as well have relied on the recent death of any other of his acquaintances, claiming that he had innocently acquired the pistols from that acquaintance.

Even when the prospect of a favorable ruling is *de minimis*, the practice of ruling prior to trial on motions such as respondent's provides defendants with a powerful incentive for filing such motions. The motion may be denied following a pre-trial hearing, but the defendant will have obtained a preview of the government's case in the form of evidence showing that the defendant could not have been prejudiced by any pre-accusation delay that occurred. Thus, motions such as respondent's may serve to avoid restrictions on the discovery permitted criminal defendants prior to trial. See, *e.g.*, 18 U.S.C. 3500; Rule 16, Fed. R. Crim. P.; cf. *United States* v. *Mandujano*, *supra*, 425 U.S. at 595 n. 12 (Brennan, J., concurring).

[41] In the event of a guilty verdict, trial courts could rule on motions such as respondent's, as well as any other motions deferred for good cause, prior to entering judgment on the verdict.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded with instructions to reinstate the indictment.

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